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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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8 UNIVERSAL TRADING & INVESTMENT
9 CO,

10 Plaintiff,

11 v.

12 KIRITCHENKO ET AL,

13 Defendant.
14

No. C-99-03073 MMC (EDL)

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION TO COMPEL FURTHER
DEPOSITION OF DEFENDANT PAVLO
LAZARENKO**

15 On July 10, 2007, Plaintiff's Motion to Compel Further Deposition of Defendant Pavlo
16 Lazarenko came on for hearing. John Aspelin represented Plaintiff, and Doron Weinberg
17 represented Defendant Lazarenko. After full consideration of the papers and for the reasons stated
18 at the hearing, the Court GRANTS Plaintiff's Motion to Compel as follows.

19 **I. Background**

20 Discovery in this matter has been contentious, punctuated by multiple discovery orders, and
21 the Lazarenko deposition in particular has been the subject of multiple motions before this Court.
22 Discovery has formally closed, yet the parties continue to bring discovery issues before the Court.
23 The greater number of motions have been brought by Plaintiff, which exhibit an escalating level of
24 frustration. Throughout this history, Defendant has aggressively asserted his Fifth Amendment
25 privilege against self-incrimination. This Court has cautioned Defendant more than once to assert
26 the privilege only when appropriate, and to otherwise participate in discovery. Defendant's
27 compliance, however, has been minimal.

28 Defendant Lazarenko was first ordered to comply with discovery in August 1999. "Plaintiff
is granted expedited discovery, including the taking of the depositions of Mr. Petro Mikolayevich

1 Kiritchenko and Mr. Pavlo Ivanovich Lazarenko at the Federal Detention Center in Dublin,
2 California. The parties may engage in discovery, without prejudice to defendants filing a motion for
3 protective order, motion to stay and/or other motion.” August 31, 1999 Order Denying Motions to
4 Expunge Lis Pendens, Allowing Discovery, and Scheduling Motions and Amendment to Complaint,
5 at 2:20-25. Following that Order, after two months of scheduling delays, Defendant Lazarenko was
6 deposed in his individual capacity on October 20, 1999. For almost every question (including date
7 of birth and other basic questions), Defendant Lazarenko asserted the Fifth Amendment privilege
8 against self-incrimination. Plaintiff’s efforts at discovery were also hindered when the deposition
9 was terminated early. The deposition was intended to last two days but it ended early on the first
10 day, and Lazarenko failed to appear the next morning, citing a “preexisting medical condition.” See
11 Plaintiff’s Expedited Motion to Compel or for Entry of Defaults (Doc. No. 1262), at 1:28-2:17.

12 Plaintiff subsequently moved to compel discovery from Lazarenko and other Defendants,
13 which Judge Legge granted in part on January 20, 2000: “Plaintiff’s motion to compel further
14 responses to discovery from Defendant Pavlo Lazarenko, Tamara Kiritchenko, Peter Kiritchenko,
15 Izabella Kiritchenko, Ludmilla Kiritchenko, and Dugsbery, Inc. is GRANTED to the extent
16 discovery sought does not implicate the Fifth Amendment... .” January 24, 2000 Order Regarding
17 Further Discovery, at 2:13-18 (Ex. C). Discovery did not progress, however, and six months later
18 the Court stayed discovery on July 7, 2000 to allow the parallel criminal proceedings to proceed, and
19 did not lift the stay until December 7, 2005.

20 Plaintiff promptly resumed discovery, and Defendants accordingly sought a protective order.
21 The Court denied that motion, holding: “Defendants’ Motion for Protective Order re 30(b)(6)
22 Depositions is denied without prejudice to Defendants’ assertion of the Fifth Amendment to specific
23 questions. Defendants must promptly respond, identify, and produce witnesses for Plaintiff’s
24 notices of deposition.” January 24, 2006 Order Denying Motion for Protective Order Re 30(b)(6)
25 Depositions.

26 Discovery proceeded and on October 12, 2006, Plaintiff served a Notice of Taking
27 Deposition Duces Tecum Re: Defendant Dugsbery, Inc. of Pavlo Lazarenko in Capacity of Principal
28 and Beneficial Owner of Dugsbury, Inc., California Corporation, noticing the deposition for

1 November 9-10, 2006.

2 No one appeared on the scheduled date in response to these notices, due to counsel's
3 conflicts and Lazarenko's confinement. In response, Plaintiff filed a renewed motion for summary
4 judgment and for default against Dugsbery. Defendant subsequently filed a motion for a protective
5 order, which the Court again denied, stating: "Defendant [Lazarenko] is not entitled to a blanket
6 protective order against answering questions at deposition, either as the custodian of records for
7 Dugsbery or as principal or beneficial owner." December 22, 2006 Order, at 4:2-4. The Court
8 further ordered that: "Defendant [Lazarenko] will produce responsive documents relating to
9 Dugsbery, documents filed in the Ukrainian court, and documents received from the United States
10 government that are in his possession, custody or control." Id. at 8:8-10.

11 In February 2007, Plaintiff wrote to defense counsel at least three times, proposing dates for
12 deposition before March 15. Plaintiff also requested that Defendant comply with the Court's
13 December 22, 2006 Order requiring Defendants to produce certain documents received from the
14 government and to supplement interrogatories to correct boilerplate objections. Plaintiff received no
15 response. Finally, on February 23, 2007, Plaintiff served a Supplemental Notice Re: Resuming
16 Suspended Deposition of Defendant Pavlo I. Lazarenko *Duces Tecum*, and a deposition was finally
17 scheduled for April 2, 2007. Objecting that Defendant had already been deposed, Defendant
18 Lazarenko failed again to appear for deposition on April 2, 2007, the 5th time Plaintiff tried to take
19 his deposition. See Motion to Strike at 2:25-27.

20 Defendant Lazarenko filed two motions for a protective order to prevent a deposition of
21 Lazarenko. This Court again denied both motions. In its first order, filed to protect Lazarenko from
22 having to appear at the April 2, 2007 deposition, the Court held that Lazarenko was required to
23 appear for deposition. The Court explicitly stated that Lazarenko could not assert a blanket privilege
24 objection: Lazarenko could only assert his Fifth Amendment privilege as appropriate on a question-
25 by-question basis. See December 22, 2006 Order.

26 Despite this order, Defendant continued to rebuff Plaintiff's attempts to depose Lazarenko,
27 and subsequently brought a second motion for a protective order. In the second motion, Defendant
28 subsequently questioned the Court's decision to allow the deposition to proceed, arguing that the

1 Court was unaware that Lazarenko had previously been deposed when it issued its ruling.
2 Defendant, however, was mistaken, and its actions in refusing to comply with the Court's earlier
3 Order were highly questionable. Accordingly, the Court also denied the second motion for a
4 protective order, and ordered Defendant again to appear for deposition. In its May 2, 2007 order, the
5 Court cautioned the witness and his counsel, ordering them to: "comply with the rules for deposition
6 and not make speaking objections or unduly delay responses. The Fifth Amendment privilege shall
7 be asserted, if at all, on a question-by-question basis." May 2, 2007 Order.

8 Pursuant to the May 2, 2007 Order, Defendant Lazarenko was deposed again on May 14-16,
9 2007. During the deposition, Defendant's counsel several times instructed Lazarenko not to answer
10 certain questions on the sole ground that the question was beyond the scope of the Second Amended
11 Complaint, although the Court had not previously ruled that the subject areas in question were
12 outside the scope of relevance. Defendant's counsel at no time sought to adjourn the deposition to
13 seek a protective order. Plaintiff accordingly challenged the instructions not to answer, as well as
14 challenging improper assertions of privilege. Plaintiff now seeks to compel Lazarenko to appear for
15 further deposition to respond to questions he improperly refused to answer.

16 **II. Legal Standard**

17 Grounds for instructing a civil deponent not to answer a question are very limited. Under
18 Rule 30(d)(1) of the Federal Rules of Civil Procedure, any objection "must be stated concisely and
19 in a non-argumentative and non-suggestive manner," and the deponent may be instructed not to
20 answer "only when necessary to preserve a privilege, to enforce a limitation directed by the court, or
21 to present a motion under Rule 30(d)(4) [to seek a protective order or limitation during the course of
22 the deposition]." The grounds for a motion under Rule 30(d)(4) are a showing that the deposition is
23 being conducted in bad faith or "in such a manner as unreasonably to annoy, embarrass, or oppress
24 the deponent or party." None of the grounds provided in Fed.R.Civ.P. 30(d) serve to justify an
25 instruction not to answer based on counsel's belief that the question is outside the scope of
26 relevance. To the contrary, even when objections are raised, "[e]vidence shall be taken subject to
27 the objection." Fed.R.Civ.P. 30(c). As detailed in the transcript excerpts provided by Plaintiff,
28 Defendant's counsel did not limit his instructions not to answer to privilege grounds. Accordingly,

1 these instructions were improper and the relevance objections are overruled. Plaintiff is entitled to
 2 ask again the questions for which Defendant's counsel gave an improper instruction not to answer,
 3 that is, an instruction based on any reason other than privilege or to enforce a limitation previously
 4 directed by the Court.

5 Objections to deposition questions on the ground of statutory or common-law privilege are
 6 generally waived if no such objection is timely made during the deposition. See Baxter v. Travelnol
 7 Labs., Inc. v. Abbott Labs, 117 F.R.D. 119, 119 (N.D. Ill. 1987) ("delay in claiming the privilege
 8 may result in a waiver"); Schwartz, Tashima & Wagstaffe, RUTTER GROUP PRAC. GUIDE: FED.
 9 CIV. PRO. BEFORE TRIAL (The Rutter Group 2007), at § 11:1553 (attorney-client and work product
 10 privileges waived if not timely asserted in deposition). There is no bright-line rule, however, with
 11 respect to waiver of the Constitutional Fifth Amendment privilege against self-incrimination.

12 Defendant argues that this Court should not find waiver because the Fifth Amendment
 13 privilege is "not to be lightly inferred," and argues that to be effective, a waiver of the privilege must
 14 be certain and unequivocal. See Def'ts' Supp. Mem. in Opp. of Plaintiff's Mot. to Compel, at 5-6
 15 (citing Smith v. United States, 337 U.S. 137, 150 (1949) and United States v. Steffen, 103 F.Supp.
 16 415 (N.D.Cal. 1951)). However, the law is clear that the privilege "is not ordinarily self-executing
 17 and must be affirmatively claimed by a person whenever self-incrimination is threatened." See
 18 United States v. Anderson, 79 F.3d 1522, 1427 (9th Cir. 1996) (citations omitted).

19 Defendant argues that by failing to raise the privilege for particular questions which he did
 20 not answer on grounds of relevance, while at the same time asserting it for hundreds of other
 21 questions, Defendant Lazarenko "intended only to point out the impropriety of certain overreaching
 22 questions, and not to relinquish his constitutional rights." Def'ts' Supp. Mem. at 6. Defendant
 23 argues that the Court should apply the Klein test to evaluate whether Lazarenko has waived his Fifth
 24 Amendment privilege by examining testimonial statements. See Klein v. Harris, 667 F.2d 274, 287
 25 (2d Cir. 1981) (applying a two-prong test for inferring from prior testimony a waiver of the Fifth
 26 Amendment privilege).

27 As this Court discussed in its December 22, 2006 Order in this matter, the Klein two-prong
 28 test has not been expressly adopted in the Ninth Circuit. Moreover, the Klein test is not directly

1 applicable here. Klein evaluates whether prior statements preclude a witness from asserting the
2 Fifth Amendment privilege as to those subject areas in subsequent proceedings. Klein does not
3 examine the question at issue here: whether a failure to assert a Fifth Amendment privilege in
4 response to a deposition question waives the privilege. But neither do the cases in which inadvertent
5 waiver was found where a party testified instead of asserting the privilege. This Court can find no
6 case holding that a failure to assert the Fifth Amendment privilege in deposition, while refusing to
7 respond to the question on other grounds, constitutes a waiver of that Fifth Amendment privilege.
8 Klein is instructive, however, in its reminder that “a ‘testimonial waiver’ is not to be lightly inferred,
9 and the courts accordingly indulge every reasonable presumption against finding a testimonial
10 waiver.” Klein v. Harris, 667 F.2d at 287 (citations omitted). Accordingly, where Defendant raised
11 only the objection of relevance and not any privilege such as the Fifth Amendment privilege against
12 self-incrimination in response to deposition questions, he has not waived the opportunity to raise the
13 Fifth Amendment privilege in response to those questions when the deposition is reopened.
14 Defendant is warned, however, to respond or assert the privilege on a question-by-question basis
15 when deposition is reopened. Further flouting of the Rules of Civil Procedure will result in
16 sanctions.

17 As to the Fifth Amendment objections challenged by the plaintiff, for the most part the Court
18 determines that they were properly raised in view of the high level of protection provided by the
19 privilege against self-incrimination. See Doe v. Glazner, 232 F.3d 1258, 1263 (9th Cir. 2000) (“the
20 privilege against self-incrimination does not depend upon the likelihood, but upon the possibility of
21 prosecution and also covers those circumstances where the disclosures would not be directly
22 incrimination, but could provide an indirect link to incriminating evidence.”) (internal quotations
23 omitted); December 22, 2006 Order at 3. The Court agrees with Defendant that the dismissed counts
24 of the indictment cannot be neatly severed from the remaining counts such as to make answering
25 questions about subjects that Plaintiff contend relate only to the former of no potential danger of
26 further incrimination as to the latter. Nor can the time frame be neatly segregated. The Court
27 overrules, however, the assertions of privilege as to the publicly-known answers to the questions of
28 whether Lazarenko had ever been arrested by the Swiss government or ever posted bail in

1 Switzerland, which do not implicate the Fifth Amendment because they bear no risk of further
2 incrimination. Answering these questions will not waive the right to assert the Fifth Amendment
3 privilege as to other different questions.

4 At the hearing, the Court instructed Plaintiff, if he contended that other questions were
5 similarly seeking information not subject to the privilege, to submit by July 12, 2007 a further list of
6 similar questions for the Court to determine if any additional questions may be re-asked when the
7 deposition is reopened. The Court allowed Defendant until July 13, 2007 to defend its response to
8 any question on Plaintiff's list for which Defendant believes the Fifth Amendment privilege
9 assertion was proper, or the relevance or other objection was founded. Plaintiff submitted additional
10 challenges to the Court on July 12, 2007. Defendant filed a response on July 13, 2007.

11 Accordingly, the Court will issue a separate order.

12 Plaintiff also challenged the sufficiency of Defendant's document production, arguing that
13 Defendant failed to comply with Court orders to produce documents before Defendant's deposition.
14 Defendant responded at the hearing that he produced all the documents he had that were responsive,
15 other than the information provided to the government under the protection of a proffer agreement,
16 which will be not be produced unless Judge Chesney sustains the objections to the Court's June 8,
17 2007 Order Denying Request for Partial Reconsideration.

18 At the hearing, Defendant and Defendant's counsel were ordered to each file a declaration
19 pursuant to the Court's Standing Order re Discovery, confirming in writing that all documents
20 responsive to Plaintiff's requests, as modified by the Court's orders, that are locatable after a
21 diligent search of all locations at which such materials might plausibly exist, have been produced to
22 the extent the documents are not privileged or being withheld due to treaty or other confidentiality
23 obligations. These declarations were filed on July 13, 2007.

24 As to documents that have been withheld, Defendant is ordered to produce a log, on a
25 category-by-category basis rather than a document-by-document basis. The log shall also be
26 produced within two weeks of the date of this Order. If Plaintiff wishes to challenge the documents
27 withheld, Plaintiff may file a motion to compel the challenged documents within 14 days of the date
28 the log is produced.

1 **IT IS SO ORDERED.**

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3 Dated: August 2, 2007

Elizabeth D. Laporte

ELIZABETH D. LAPORTE
United States Magistrate Judge